SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Defendant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Seventh Circuit will be found in Record Pages 127 to 132, reported in (185 Fed. 2nd P. 27).

II

Jurisdiction

The jurisdiction of the court is invoked under Title 28 U. S. C. A., Section 1254.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit to be reviewed was entered

on October 23, 1950. Petition for rehearing was denied December 4, 1950.

III

Statement of the Facts

The statement of the case appears under heading (B) of the petition for writ of certiorari. In the interest of brevity this statement is not here repeated, but by reference thereto is incorporated herein.

IV

Question Presented

The question specifically brought forth by the petition for writ of certiorari appears under the heading (C) of the petition. Again in the interest of brevity this statement is not repeated here, but by reference thereto is incorporated herein.

V

Summary of Argument

To hold as the Court of Appeals for the Seventh Circuit did in this case, that before the plaintiff can recover for personal injuries sustained in a railroad crossing accident, under the law of Indiana he must prove himself free from contributory negligence, is in direct conflict with all of the statutes and decisions of the State of Indiana on that subject.

VI

Argument

The Court of Appeals for the Seventh Circuit held that it must decide this case in accordance with the law of Indiana, and that under that law plaintiff as a prerequisite to recovery is required to show that at the time and place of

the accident he was in the exercise of due care and caution for his own safety, or, in other words, that he was free from negligence which contributed to the cause of this accident (R. P. 130).

Section 2-1025 of Burns Indiana Statutes, Acts 1899, Ch. 41, Sec. 1, Page 58 provides:

> "Personal injuries-Contributory negligence.—Hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence on the part of the plaintiff, or such person, shall be a matter of defense, and such defense may be proved under the answer of general denial; Provided, That this act shall not affect pending litigation."

This statute makes contributory negligence on the part of the plaintiff a matter of defense and places the burden of proof of contributory negligence on the defendant. The decision of the Circuit Court of Appeals, Seventh Circuit, shifts the burden of proof of contributory negligence from the defendant to the plaintiff which is in direct conflict with the law of the State of Indiana.

The United States Supreme Court held in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, that it is the duty of the Federal Courts to follow state decisions on matters of general law, and petitioner respectfully submits that the Indiana law is that contributory negligence is a matter of defense, and the burden of proof is on defendant in personal injury actions. Contributory negligence in personal injury actions in Indiana is a question of fact for the jury, and it is only

where facts are undisputed and where but a single inference can be drawn from the facts that the court can say as a matter of law that certain acts do or do not constitute contributory negligence.

Cushman Motor Delivery Co. v. *McCabe,* 219 Ind. 156; 36 N. E. 2nd, 769;

Baltimore and Ohio Railroad Co. v. *Reyher,* Admrx. 216 Ind. 545; 24 N. E. 2nd, 284;

Bartley v. *Chicago E. & I. Ry. Co.,* 216 Ind. 512; N. E. 2d 405;

Burns Indiana Statutes 2-1025.

This was recognized as being the law of Indiana on contributory negligence in personal injury cases by this same Court of Appeals for the Seventh Circuit, in the case of *Dommer* v. *Pennsylvania R. R. Co.* (1946), 156 Fed. 2nd, 716.

In the instant case, the train was not occupying the crossing ahead of plaintiff as he approached, and there is no showing in the evidence that plaintiff failed to look and listen for approaching trains. There is no showing that plaintiff drove blindly into a place of known danger.

The Court says in the instant case, furthermore, it appears that at the time and place of the collision plaintiff was operating his automobile in violation of the Statutes of the State of Indiana, and quotes Sub-sections A and D of Section 47-2004, Burns Statutes. In this connection may we call the Court's attention to the fact that the train was neither on or near, or entering the highway *in compliance with legal requirements, and with the duty of all persons to use due care.* Sub-section D is dependent on Sub-section A in that the duty imposed on a driver of a vehicle shall be consistent with the requirements of Sub-section A, and that he shall drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing.

Careful examination of the record will reveal that there is no evidence in this case indicating that plaintiff was operating his automobile in violation of this statute. The Court further says that under the law of Indiana, it is negligence as a matter of law to operate a motor vehicle on a highway at a rate of speed in excess of that within which the operator can bring to a stop within the range of his vision.

Careful examination of the record will reveal that there is no evidence in the record that plaintiff could not bring his automobile to a stop within the range of his vision.

Defendant has contended, and the Court in this case has held, that plaintiff was guilty of contributory negligence as a matter of law because he was in violation of Section 47-2004 of the Statutes of the State of Indiana.

Petitioner submits that the cases cited by the Court and the defendant in support of this proposition do not sustain such a view. All of these cases involve factual situations which are very different from the instant case.

There is no proof that plaintiff was driving his vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards than existing, or that his speed was not so restricted as may be necessary to avoid colliding with any person or vehicle or other conveyance on or near, or entering the highway *in compliance with legal requirements* and with the duty of all persons to use due care.

The Court agrees in its opinion that the train was not on or near, or entering the highway in compliance with legal requirements, and with the duty of all persons to use due care because, in the Court's opinion, Record Page 130, the Court says:

> "In the case at bar there is negative evidence ~~that~~ the railroad failed to sound the whistle, ring the bell,

> or turn on its head lights attached to its locomotive as it approached the crossing, although, its employees in charge of the train testified that these things were done. For the purpose of this appeal we may assume that the railroad company might probably be found negligent in those respects."

There is also no proof that plaintiff did not comply with the requirements of Sub-section (a) in driving at a reduced speed when approaching and crossing an intersection or railroad grade crossing.

It can not be assumed that the train was on or near, or entering the highway in compliance with legal requirements, and with the duty of all persons to use due care, nor can it be assumed that because a collision occurred, petitioner was operating his automobile in violation of this statute.

It is submitted that this statute is of no benefit to the defendant in this case for the reason that the burden of proof which was upon defendant was not met by any proof of facts justifying the above assumptions. Section 2-1025, Burns Indiana Statutes, 1933. In the absence of such proof, it is submitted that defendant's case cannot be predicated upon this statute.

Dommer v. *Pennsylvania R. R. Co.* (1946), 156 Fed. 2nd, page 716.

A violation of the statutory provision under discussion would not constitute contributory negligence as a matter of law. This was the holding of the Indiana Court in the case of *Coats* v. *Strawmeyer*, 107 Ind. App. 102, 21 N. E. 2nd 433, in an analogous situation. In that case, the defendant argued that the violation of a city ordinance was sufficient to establish contributory negligence as a matter of law. The Court said (107 Ind. App. at page 105, 21 N. E. 2nd, page 435):

> "The mere fact that appellee was negligent in violating such ordinance does not warrant a reversal of

> the judgment. To warrant a reversal on the grounds of appellee's negligence, it must be conclusively shown by the evidence that such negligence 'contributed' to the accident''.

Thus, the mere fact that the statute may have been violated does not establish defendant's legal proposition.

The question of contributory negligence in respect to the violation of the statute was properly submitted to the jury.

> *Dommer* v. *Pennsylvania R. R. Co.* 156 Fed. 2nd, 716, page 718.

Defendant contends that petitioner was guilty of contributory negligence as a matter of law because he operated his vehicle on a highway under such conditions that he could not see and heed warning signs erected and maintained for the protection of persons using the highway, and that he was operating his motor vehicle on the highway at a rate of speed in excess of that within which he could bring it to a stop within the range of his vision.

These conditions must be considered in connection with all attending circumstances including the fact that the railroad company failed to sound the whistle, ring the bell, or turn on its head lights attached to its locomotive as it approached the crossing, also including the fact that the circular disc warning travelers of the existence of a railroad crossing was placed 800 feet from the crossing, and that it was at this location of 800 feet from the crossing that plaintiff passed an automobile driven by one Alvin Wentworth. Petitioner submits that it was for the jury to decide under these circumstances whether or not petitioner was guilty of contributory negligence.

> *Bartley* v. *Chicago E. & I. Ry. Co.* 216 Ind. 512; 24 N. E. 2nd, 405.

Defendant's contentions in this case and the decision of the Circuit Court of Appeals, if followed to a logical conclusion would mean that the very occurrence of a collision under the circumstances as shown by this record would constitute contributory negligence as a matter of law. The Indiana Supreme Court has construed a similar statute (10-1909 Burns Indiana Statutes, 1933) contrary to defendant's position.

Heiny v. *Pennsylvania R. R. Co.* 221 Ind. 367, 47 N. E. 2nd, 145.

In the *Heiny* case the statutory language was even more stringent than the language in Section 47-2004, Burns Indiana Statutes, 1933, which was cited in the instant case by defendant.

The decision in the *Heiny* case is decisive of the issue involved here. Petitioner submits that whether a driver has used due care, is ordinarily a question for the jury, and that in Indiana it has been thought wise to submit such question to the twelve laymen composing the jury to be decided as questions of fact under proper instructions from the Court, in order that they may bring to bear their varied experiences and knowledge of men in determining what a reasonably prudent man would ordinarily do under circumstances disclosed by the evidence.

In a case such as the instant case where an experienced trial judge submitted the question to the jury, and the jury found that there was no contributory negligence on the part of plaintiff which contributed to the accident, and the trial judge let this verdict stand, that a Court of Appeals should not say that there is no room for reasonable minds to differ on any of these questions, and therefore, should not hold as a matter of law that any precaution under consideration should or should not have been observed in the exercise of due care. So, in this case, on the facts which the jury might

properly have found from the evidence, it cannot be said that reasonable minds might not have differed on the question of whether plaintiff exercised due care.

Pennsylvania R. R. Co. v. *Dove* 184 Ind. 447; 111 N. E. 609;

Bartley v. *Chicago & E. R. Ry. Co.* 216 Ind. 512; 24 N. E. 2nd, 405, Page 410.

It is respectfully submitted that the United States Court of Appeals, Seventh Circuit, erred in reversing this judgment of the District Court.

VII

Conclusion

In conclusion, counsel for the petitioner respectfully submits that because the Court of Appeals, Seventh Circuit erred by failing to follow the state statutes and decisions of Indiana on a matter of general law as required by the United States Supreme Court ruling decision (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64), that a writ of certiorari should be granted the petitioner; that this Court should review and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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